FILED BY CLERK
JAN 27 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. ANGEL SANTAMARIA BONILLAS, Petitioner.	2 CA-CR 2011-0299-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20053448

Honorable Jose Robles, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

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E S P I N O S A, Judge.

¶1 Following a jury trial in 2009, petitioner Angel Bonillas was convicted of second-degree murder. The trial court sentenced him to the presumptive, sixteen-year prison term, to be served concurrently with a prison term he was serving in a federal matter. On appeal, we affirmed Bonillas's conviction and sentence. *State v. Bonillas*, No. 2 CA-CR 2009-0183 (memorandum decision filed June 17, 2010). Bonillas filed a

petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., raising claims of newly discovered evidence, prosecutorial misconduct, and ineffective assistance of trial and appellate counsel. On review, Bonillas challenges the court's summary dismissal of his petition and his motion for reconsideration, arguing he is entitled to a new trial, or at a minimum, to an evidentiary hearing. We will not disturb the court's ruling absent an abuse of discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 Bonillas argues the fact that Pima County Sherriff's Deputy Andrew Loza, who testified at both the suppression hearing and at trial, had testified falsely in other matters, constituted newly discovered evidence that would have changed the outcome at trial. To prevail on a claim of newly discovered evidence, a defendant must show that "[n]ewly discovered material facts probably exist and such facts probably would have changed the verdict." Ariz. R. Crim. P. 32.1(e). Bonillas bases his claim on a January 2010 Pima County Sheriff's Department Internal Affairs Memorandum that addressed an October 2009 complaint against Loza. The report concluded Loza had provided false information during a February 2009 traffic hearing in which he was the defendant. The trial court rejected Bonillas's claim that this discovery constituted newly discovered evidence, finding that the evidence challenging Loza's testimony in this trial "relates to impeachment" and "[i]f introduced such evidence would not change the verdict." We agree.

¶3 Loza was not the only individual who presented testimony unfavorable to Bonillas at trial. In fact, in its ruling denying Bonillas's motion to reconsider, the trial

court correctly noted, "[w]ithout Deputy Loza's testimony there was still evidence that [Bonillas] fired two shots through a locked steel screen security door, with [the victim] on the other side of the door. Two brothers of the victim were present during the shooting and both testified extensively." Additionally, as we found in our memorandum decision, "Notably, Bonillas conceded that in the three years since the shooting had occurred, he had never repeated to police the version of the incident he claimed at the suppression hearing to have given to Loza." *Bonillas*, No. 2 CA-CR 2009-0183, ¶ 6.

¶4 Moreover, because the complaint against Loza was initiated in October 2009, well after the trial in this matter took place in May 2009, the evidence in the report could not have been newly discovered.[1] *See State v. Bilke*, 162 Ariz. 51, 52, 781 P.2d 28, 29 (1989) (to be newly discovered, "evidence must appear on its face to have existed at the time of trial but be discovered after trial"). Finally, contrary to Bonillas's argument, we find nothing suggesting the trial court applied the wrong standard of review in stating that other evidence supported Bonillas's convictions. To the contrary, it is clear from the court's ruling that it understood and applied the correct standard of review in concluding the newly discovered evidence would not have changed the verdict in light of the other evidence of Bonillas's guilt. *See* Rule 32.1(e) (newly discovered evidence "probably would have changed the verdict").

[1]To the extent Bonillas's argument could be construed to mean that the evidence existed at the time of Bonillas's trial because Loza falsely testified before the trial in this matter took place, we reject that argument. It is clear the January 2010 internal affairs memorandum, and not the events referred to in that report, constitute the asserted newly discovered evidence.

¶5 We similarly reject Bonillas's allegation that the prosecutor's failure to disclose Loza's propensity for giving false testimony constituted prosecutorial misconduct. Bonillas asserts, inter alia, that because Loza participated in the investigation of this matter, the prosecutor had imputed knowledge of Loza's previous false statements and this was tantamount to the "intentional withholding of this information by the prosecutor's office." Bonillas also seems to suggest that, based on Loza's history, his testimony in this case was, a fortiori, "false." We find these claims without merit.

¶6 Notably, because the internal affairs report documenting Loza's previous false testimony did not exist at the time of trial, the prosecutor could not have been aware of it, and therefore could not have disclosed it to defense counsel. *See* Ariz. R. Crim. P. 15.1(b)(8) (state shall "make available to the defendant . . . [a]ll then existing material or information which tends to mitigate or negate the defendant's guilt as to the offense charged."). And, to the extent Bonillas suggests the prosecutor in an unrelated case, who may or may not have been aware of Loza's previous conduct, should have reported that information to the prosecutor in this case, there is no evidence to suggest the former prosecutor had sufficient information to impose that duty upon him or her. *Cf. State v. Rivera*, 152 Ariz. 507, 511, 733 P.2d 1090, 1094 (1987) (state generally does not "have an affirmative duty to seek out and gain possession of potentially exculpatory evidence."). The trial court correctly concluded in its denial of Bonillas's motion for reconsideration that he simply did not show " the State was involved in any misconduct."

¶7 Bonillas next asserts the trial court erred in denying his claim of ineffective assistance of trial counsel, asserting counsel was ineffective for advising him not to testify at trial, and arguing his testimony was the only way to counter Loza's incriminating testimony against him. In the affidavit filed in support of his petition for post-conviction relief, Bonillas attested he had told defense counsel he wanted to testify to challenge Loza's testimony, but counsel told him "it was not necessary." To prevail on a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objectively reasonable professional standard and that the outcome of the case would have been different but for the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). To demonstrate the requisite prejudice, the defendant must show there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

¶8 In light of the incriminating testimony by witnesses other than Loza, in addition to the potential risk of placing Bonillas on the stand to be cross-examined about shooting his inebriated nephew through a locked metal screen door and then fleeing from the scene and depositing the murder weapon in an alley, we cannot conclude the trial court erred in determining Bonillas had failed to establish a claim of ineffective assistance of counsel based on advice not to testify. "[D]isagreements as to trial strategy or errors in trial tactics will not support an effectiveness claim so long as the challenged conduct could have some reasoned basis." *State v. Meeker*, 143 Ariz. 256, 262, 693 P.2d 911, 917 (1984). A reviewing court should give deference to tactical decisions made by

counsel and should refrain from evaluating counsel's performance in the harsh light of hindsight. *Nash*, 143 Ariz. at 398, 694 P.2d at 228.

¶9 Bonillas also contends trial counsel was ineffective for failing to request testimony of the jurors upon the discovery, two days after the trial concluded, that Loza's supplemental narrative report, an exhibit that had not been admitted into evidence at trial, had been inadvertently sent to the jury. *See* Ariz. R. Crim. P. 24.1(d) (when defendant challenges validity of jury's verdict pursuant to Rule 24.1(c)(3)(i), Ariz. R. Crim. P., "the court may receive the testimony or affidavit of any witness, including members of the jury, which relates to the conduct of a juror [or] official of the court."). On appeal, we affirmed the trial court's denial of Bonillas's motion for new trial, concluding the court had not abused its discretion by finding "proof beyond a reasonable doubt that the supplemental report was 'insufficiently prejudicial given the issues and evidence in the case' and that there was 'no relationship or connection' between the report and the verdict." *Bonillas*, No. 2 CA-CR 2009-0183, ¶ 13. For the same reason, we also find no abuse of discretion in the court's denial of Bonillas's claim that trial counsel was ineffective for failing to pursue this claim at trial, and that appellate counsel was ineffective for failing to challenge trial counsel's conduct on this same ground.

¶10 Finally, because we conclude the trial court properly found Bonillas had failed to assert any colorable claims meriting post-conviction relief, we reject his claim that he was entitled to an evidentiary hearing. *See State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993) (evidentiary hearing required only when petitioner states colorable claim). The decision whether a claim is colorable and warrants an evidentiary

hearing "is, to some extent, a discretionary decision for the trial court." *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988).

¶11 For all of these reasons, we conclude the trial court did not abuse its discretion by denying post-conviction relief. Therefore, although we grant the petition for review, relief is denied.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge